

Approved For Release 2002/08/15 : CIA-RDP87B01034R000100030013-8

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23 DEC 1976

Honorable James T. Lynn, Director
 Office of Management and Budget
 Washington, D.C. 20503

Dear Mr. Lynn:

In response to your General Counsel's letter to me of 2 November 1976, I am enclosing herewith additional material explaining in detail my opposition to provisions of the proposed Executive order entitled, "Suitability Requirements for Government Employment," which was forwarded to me for comment.

As I indicated in my letter to you of 19 October 1976, I am concerned that neither the Central Intelligence Agency nor the Intelligence Community Staff was consulted in the process of drafting this proposed Executive order. The problems inherent in the document are of such magnitude that, in my view, the Intelligence Community should be excluded from its provisions. I appreciate the understanding expressed in Mr. Nichols' letter and in light of his request for further assistance in redrafting this order, officers on my staff have carefully reviewed the draft order and have identified and explained those provisions which pose problems for the Government's National Foreign Intelligence Program, in terms of suitability requirements for Government employment and, concomitantly, the granting of access to foreign intelligence related information which it is my statutory responsibility to protect.

In light of the apparently substantial opposition to provisions of this draft order by other Executive agencies and departments, and considering the problems identified by my staff, I must stress that, upon review by your office of the material enclosed herewith, we be kept informed of future developments to ensure that the needs and responsibilities of the Intelligence Community are adequately reflected.

As I indicated in my 19 October letter, it is my view that our efforts should be directed toward developing a uniform program for suitability and security requirements related to Government employment--a single document that will form the basis for such programs throughout the Executive Branch. In order to accomplish this, however, the Executive order must establish clearly that the Director of Central

Intelligence has the statutory responsibility and authority for the protection of intelligence sources and methods; it therefore must be unambiguous in recognizing that the standards for granting access to Sensitive Compartmented Information and to intelligence sources and methods are solely the responsibility of the Director of Central Intelligence. To meet both of these objectives, the enclosure proposes the addition of certain language to Section 4 of the proposed order. Here and elsewhere, the draft Executive order must recognize that the field of intelligence is unique and demands the use of certain procedures not commonly utilized by other Government agencies and departments.

I trust this letter and the enclosed material will be of assistance to your staff as they begin the process of redrafting this proposed Executive order. I would only reiterate my concern that the views and requirements of the Intelligence Community be reflected fully in this Executive order. Absent this, my view remains that the Intelligence Community must be exempted from the terms of the Executive order, per the amendment I proposed in the enclosure to my letter to you of 19 October 1976. It is my continued hope, however, that our coordinated efforts to resolve the problems posed by the draft order will result in the development of a program which in its scope and effect will be most beneficial to the Government as a whole.

Sincerely,

George Bush

George Bush

Enclosures

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OLC:RLB:hms (typed 10 December 1976)

Enclosure I

EXPLANATION OF AMENDMENTS TO THE PROPOSED EXECUTIVE ORDER, "SUITABILITY REQUIREMENTS FOR GOVERNMENT EMPLOYMENT," BY THE DIRECTOR OF CENTRAL INTELLIGENCE

1. SECTION 2. Several of the definitions in this Section lend themselves to misinterpretation, omit concepts important to national security considerations, and fail to adequately reflect the responsibilities and authorities of the Director of Central Intelligence under the National Security Act of 1947, as amended, the Central Intelligence Agency Act of 1949, as amended, and Executive Order 11905. In order to properly reflect these concerns and to make the definitions compatible with later provisions in this draft order, a number of amendments have been proposed, most of which are self-explanatory. Attention is directed, however, to the following:

- a. The term "Agency Head" should be broadened; as defined in the draft order, the term would exclude, for example, the Director of the Defense Intelligence Agency since that office, while constituting a major component of the Intelligence Community, was not established by statute or Executive order, as would be required to qualify as an agency head under this definition.
- b. The proposed omission of the last sentence of the definition of "Complaint Investigation" is deemed necessary to remove language which appeared superfluous and unclear.
- c. It is strongly urged that, as proposed in Enclosure II, the definition of "Adjudication" include specifically the concept of "loyalty" in order to affirm that it is a required qualification for Federal service, particularly in those cases involving Positions of Special Trust.
- d. The definition of "Federal Service" should be amended in order to make clear that contractors and their employees are not, for purposes of this Executive order, considered to be included in the Federal Service.
- e. The "Full Field Investigation" as defined in this Section should be expanded to include as an element thereof the establishment and verification of an individual's identity.

f. As modified by the proposed amendment noted in Enclosure II, the definition of "Position of Special Trust" is acceptable; care should be taken, however, to avoid an interpretation of this term, such as that contained in the summary of the draft Executive order, which would include, as an element of a Position of Special Trust, the fact that the adverse impact on the national interest must be "irreparable," a standard which would be unrealistically stringent and would be extremely difficult to define.

g. The statutory cite included in the definition of "Sensitive Compartmented Information" appears to be in error, and an amendment has been proposed to correct it.

h. As with the proposed change to the definition of adjudication, the concept of "loyalty," as defined in this Section, must be included in the definition of "Suitability."

i. Changes to the definition of "Suitability Determination" have been proposed in order to establish clearly that access to Sensitive Compartmented Information, intelligence sources and methods, and intelligence information shall be governed by the authority vested in the Director of Central Intelligence and not the Civil Service Commission or any other department or agency.

2. SECTION 3. The partial exemption for components of the Intelligence Community contained in subsection (b) is ambiguous and incomplete. The proposed amendment would properly include all organizations within the Intelligence Community as defined by Executive Order 11905, and reflects the fact that pursuant to his statutory responsibilities and authorities, the Director of Central Intelligence must maintain ultimate authority for the establishment of personnel suitability investigation and adjudication programs as they relate both to the Government's foreign intelligence program and to access to foreign intelligence information and sources and methods. These proposed changes reflect the necessity that the Director of Central Intelligence not be required to accept certification of clearances which do not meet the minimum security requirements as established by the Director of Central Intelligence pursuant to his statutory responsibilities. To hold otherwise, or to establish a two-tiered system of granting clearances, would not only be inconsistent with such statutory authorities but would prove costly and contrary to the legitimate intent of this proposed order.

3. SECTION 4. The additional language proposed to be inserted at the last sentence of this Section clarifies that the Director of Central Intelligence retains, pursuant to his statutory responsibilities, the authority to prescribe standards for access to the cited categories of information.

4. SECTION 5. The proposed amendments to this Section reflect the necessity that "loyalty" is and must remain an essential element of any standard governing a Position of Special Trust in the U.S. Government.

5. SECTION 6. A number of substantive changes have been made at various points in this Section to reflect the interests and needs of the National Foreign Intelligence Program with respect to Positions of Special Trust established pursuant to this order. As a threshold issue, the limitation that Positions of Special Trust be filled only by U.S. citizens would pose severe problems for the Intelligence Community and would seriously hamper the ability of the Central Intelligence Agency to carry out its mandate.

The definition of "National Security" activities in paragraph (a) (1) lacks clarity and the proposed amendment more properly defines national security activities.

The wording of paragraph (c) (1), "Authority to Designate," in effect fails to extend to certain organizational components of the Intelligence Community the authority to designate Positions of Special Trust. The heads of all components of the Intelligence Community as defined in Executive Order 11905 should have such authority, and a proposed amendment to this subsection corrects this apparently inadvertent error (the proposed language would include, for example, the National Security Agency and the Defense Intelligence Agency, neither of which were "established by statute or Executive order"). Furthermore with respect to this paragraph, the limitation that only the heads of Executive departments or agencies would have the authority to designate, certify, or redesignate Positions of Special Trust would place an unnecessary burden on such officials; the proposed amendment would allow this authority to be delegated. The proposed amendment also would remove the requirement that every Executive organization maintain a record system concerning the certification and redesignation of Positions of Special Trust. Such a system would seem burdensome and of little practical value. Finally, the proposed amendatory language in this paragraph reflects that, as between the authorities and responsibilities of the Civil Service Commission and the Director of Central Intelligence, the latter, under his statutory authority to protect intelligence sources and methods and to maintain the confidentiality of organizational and personnel matters of the Central Intelligence Agency, is not and should not be required to make such an accounting.

Attention is drawn to the analysis and summary of this proposed Executive order prepared by the Domestic Council Committee on the Right of Privacy, in which the term "unacceptably adverse impact" as used in subsection (a) means that failure in such a position must result in "irrevocable harm." This explanation would involve the necessity of predicting in advance what action or lack thereof would have results that never could be repaired--clearly an unrealistic standard by which to measure the sensitivity of Government positions. Care should be taken that the history of this Executive order not reflect the concept that "unacceptably adverse impact" is limited to those instances where "irrevocable harm" results.

6. SECTION 7. Strong objection is taken to the standards for conducting suitability investigations outlined in this Section. The standards as proposed in this draft order fail to reflect the minimum standards necessary to enable the Director of Central Intelligence to properly carry out his statutory responsibilities to protect intelligence sources and methods from unauthorized disclosure, a mandate which necessarily implies a responsibility to ensure that only those individuals of the highest character and loyalty be granted access to the Government's foreign intelligence information. Substantive changes as to the basis, scope, and particular investigative considerations, as outlined in this Section, are proposed in Enclosure II.

Paragraph (d) (1) must include, at the outset, authority for the Government to investigate, in addition to those factors outlined in the proposed order, an individual's identity and loyalty before any individual is allowed to occupy a Position of Special Trust. In addition, the time parameters for conducting suitability investigations for Positions of Special Trust must be extended beyond the five-year period proposed in this draft Executive order. Under a five-year investigative period, for example, a foreign agent attempting to penetrate a sensitive area of the U. S. Government would be required to establish an identity and sit tight only for a five-year period before attempting to secure the position he desires. Evidence indicates there has been no decrease in efforts by hostile intelligence services to penetrate our Government's foreign intelligence program. These inadequate standards for suitability investigations would make the detection of such agents far more difficult than at present.

The Central Intelligence Agency and the Intelligence Community Staff, therefore, propose that the minimum requirements for suitability investigations for Positions of Special Trust remain identical with those contained in Director of Central Intelligence Directive No. 1/14. It is

these standards that are proposed as an amendment to subparagraphs (i) - (ix) of paragraph 7 (d) (1). Additional changes are made to paragraph (d) (2) in order to remove certain impractical limitations on the use of a so-called "emergency" Position of Special Trust.

Subsection (e) is amended to reflect the special considerations and needs of the Intelligence Community which must be taken into account in determining the procedural requirements to be followed in allowing the subject of a suitability investigation to be made aware of the activities being conducted by the investigating department or agency. The responsibilities of the Director of Central Intelligence to protect intelligence sources and methods and to retain the confidentiality of Central Intelligence Agency personnel and organizational matters are reflected in the proposed amendment.

Paragraph (f) (1), "Sources of Investigative Information," is expanded to include specifically information related to birth and citizenship records of individuals who are the subject of suitability investigations. Such information may be of critical importance in assessing the suitability and trustworthiness of an individual being considered for a position involving access to sensitive foreign intelligence information.

Paragraph (f) (2) must be amended as proposed in Enclosure II to afford the Intelligence Community the flexibility to conduct investigations while protecting, as necessary and as required by statute, the identity and role of the Central Intelligence Agency in conducting suitability investigations. The notification procedures and elements as enumerated in paragraph (f) (2) could be construed to conflict with the above-mentioned responsibilities of the Director of Central Intelligence to protect certain information, as well as his authority to terminate any officer or employee of the Central Intelligence Agency "whenever he shall deem such termination necessary or advisable in the interests of the United States" (Section 102[c] of the National Security Act of 1947, as amended).

Additional changes proposed to paragraph (f) (4) are necessary to reflect the investigative responsibilities and needs of the Central Intelligence Agency, as contained in Executive Order 11905 and including the need to conduct, where necessary, covert inquiries. The use of a polygraph in conducting background investigations is a legitimate and properly recognized tool which must remain available to the Intelligence Community if effective and adequate investigations are to be conducted and intelligence sources and methods are to be fully protected against compromise.

The provisions at page 21 of the draft Executive order, paragraph (j) (1), have been amended to ensure a uniform base-level reinvestigation program for Positions of Special Trust. The new language would operate to upgrade investigative criteria to a level acceptable for positions and matters involving foreign intelligence information.

7. SECTION 8. The addition of the term "deviate" to subparagraph (b) (1) (ii) reflects a legitimate concern of the Intelligence Community that certain behavior, which may not properly be categorized as "criminal, dishonest, infamous or notoriously disgraceful," nonetheless comprises a legitimate factor which should be considered as one basis for disqualification. At page 23 of the proposed order, subparagraph (b) (2) (i), the term "relationships" has been added to include, as a proper subject for investigations involving Positions of Special Trust, associations with foreign intelligence personnel, suspect individuals or groups. Such relationships have been and will continue to be circumstances utilized by opposition forces to gain leverage or control over particular individuals.

The additional term "demonstrably" at page 25, subparagraph (c) (2) (vi), would require that prior to consideration of social or environmental conditions in an adjudication procedure, they must be shown to actually have had an effect on the conduct in question. Deletion of the last clause of subparagraph (c) (2) (viii) eliminates an apparent redundant provision of the proposed order.

As drafted, subparagraph (c) (3) (ii) at page 26 of the proposed order does not go far enough in allowing or requiring that the Government, in investigating an individual employee as described in this therein, look behind the mere fact that such employee has recognized a potentially adverse situation and has come forward to the "appropriate authority." Particularly in those situations in which an individual employee in a Position of Special Trust has access to foreign intelligence information, the voluntariness and candor with which that employee comes forward cannot be considered as mitigating circumstances unless the motivation for such conduct is known. Voluntariness and candor at most should be considered as evidence of possible rehabilitation.

The additional language inserted at subsection (e), page 27, reflects once again the legitimate need, in certain circumstances, to maintain adequate cover considerations during and after investigations related to the National Foreign Intelligence Program.

8. SECTION 9. The additional language proposed for subsection (a), reaffirms the existing statutory authority of the Director of Central Intelligence to terminate employees whenever such action is deemed necessary in the interests of the United States (Section 102[c] of the National Security Act of 1947, as amended). In the context of this proposed Executive order, and particularly regarding this Section which purports to set forth due process requirements for certain Federal employees and applicants, the authorities and responsibilities of the Director of Central Intelligence must be specifically referenced. This is necessary to make clear the meaning and extent of the standards in the proposed Executive order, and so as not to mislead persons who might in the future turn to this proposed Executive order, if enacted, for recourse in a judicial or administrative proceeding.

The alterations to paragraph (b) (1) are necessary so as not to prejudice or preclude the use of legitimate investigative procedures involving cover considerations by agencies and departments dealing with foreign intelligence information.

The various changes at pages 28 through 31 are necessary so as to bring the proposed procedures into line with the existing authorities and responsibilities of the Director of Central Intelligence, and in order to reflect the fact that the Central Intelligence Agency and certain other components of the Intelligence Community are in the excepted service and not the competitive service. The procedures outlined in this Section must reflect existing differences and criteria applicable to the competitive and the excepted services.

9. SECTION 10. It is necessary to insert the proposed language to paragraph (d) at page 32 of the draft order so as to include thereunder the protection of intelligence sources and methods.

10. SECTION 13. The proposed additional language to subparagraph (i) at page 34 of the draft order reflects the fact that inclusion of the Central Intelligence Agency in an index such as proposed therein would conflict with Section 6 of the Central Intelligence Agency Act of 1949, as amended (50 U.S.C.A. 403g). The deletion of portions of the proposed Executive order at pages 36 and 37 is necessary, as such provisions would be neither practical nor workable if applied to the Intelligence Community and to foreign intelligence information. Subparagraph (iv), related to the disposal of investigative reports, should not properly be a part of an Executive order, but rather is should be governed by GSA/NARS.